

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	
VERMONT STATE EMPLOYEES')	DOCKET NO. 95-71
ASSOCIATION, INC., WARREN)	
WHITNEY, et. al)	

FINDINGS OF FACT. OPINION AND ORDER

Statement of Case

On September 19, 1995, the Vermont State Employees' Association, Inc. , ("VSEA") filed a grievance on behalf of itself and Warren Whitney, John Filipek, Tim Bombardier, Dane Shortsleeve, Michael Jennings, David Yustin, Gary Boutin, Bernard Chartier, David Tetrault, Myles Heffernan III, Charles Holden, Jean Lessard, Jeffrey Cable, and Gloria Danforth against the State of Vermont, Department of Public Safety ("Employer"). Grievants allege that the Employer violated Articles 2, 20 and 21 of the collective bargaining agreement between the State and VSEA for the State Police Bargaining Unit, effective for the period July 1, 1994, and June 30, 1996 ("Contract"), when it changed the work schedules of employees effective June 1, 1995.

On October 4, 23, and 27, 1995, Grievants requested to amend the grievance to include Martin Hatch, Ed Ledo, Robert Vargo, and Thomas Truex as Grievants. On November 29, 1995, the grievance was amended to withdraw Tim Bombardier as a Grievant. The Employer did not file motions in opposition to such amendments, and such amendments are granted.

A hearing was held on February 1, 1995, at the Labor Relations Board hearing room in Montpelier, before Board Members Catherine Frank, Chairperson;

Leslie Seaver and Carroll Comstock. David Herlihy, Assistant Attorney General, represented the Employer. VSEA Legal Counsel Samuel Palmisano represented Grievants. On February 15, 1995, the parties filed briefs and VSEA filed a motion to withdraw Grievants Dane Shortsleeve and John Filipek as Grievants. The Employer did not file a motion in opposition to this motion, and such motion is granted.

FINDINGS OF FACT

1. Article 20 of the Contract states in pertinent part:

ARTICLE 20 REGULAR WORK YEAR

Employees who are regularly assigned to work a "five-on-two off" schedule, shall continue to be eligible to receive 104 scheduled days off per calendar year and two additional days off per calendar year not scheduled, but arranged at any time at the convenience of the Department. Days voluntarily worked in whole or in part on scheduled or arranged days off in programs such as CRASH, 55 MPH or RAID are considered as days off for the purpose of this contract.

2. Article 21 of the Contract states in pertinent part:

ARTICLE 21 REGULAR HOURS AND OVERTIME

...

2. REGULAR WORK PERIOD, WORK SCHEDULE

...

... The existing shift schedules as of June 30, 1988, are incorporated into this agreement.

4. OVERTIME
 - a. OVERTIME PAY. Except as otherwise provided in this Article, hours worked in excess of 8 in a day ... shall be paid in cash at one and one-half times the straight time rate.

f. EXCLUSIONS FROM OVERTIME.

1. Overtime work does NOT include:
voluntary programs, whenever scheduled; Assignments shall be made to volunteers first. If the assignment is required, then such assignment will be made on a rotational basis . . .

7. STANDBY AND PAGER PAY

An employee who is specifically required by the Department to carry a pager during off-duty hours and who is also required to remain within paging range shall be paid one-eighth (1/8) of his or her regular straight time hourly rate of pay, up to a maximum of \$2,500 (\$3,000 effective July 1, 1995) per employee per fiscal year, for those hours during which he or she is in such status, excluding hours actually worked.

A bargaining unit member who works a duty week or duty weekend, as previously scheduled, shall receive an additional \$50 for each such week of immediate availability.

8. CALL-IN PAY

a. NON-COURT CALL-IN

An employee who is called in to work at any time other than continuously into his normal scheduled shift shall be considered as working overtime during all such hours worked and shall be guaranteed a minimum of four hours' pay at the overtime rate . . .

3. Grievants are arson investigators and investigators in the Bureau of Criminal Investigation ("BCI") unit of the Vermont State Police. All Grievants hold the rank of detective sergeant. BCI was created as a separate division from the uniformed forces in 1960 to handle the investigation of death cases. BCI has evolved over the years to include additional complex and technical investigations. Every unattended death in Vermont must be investigated by a BCI detective. There are four or five investigators assigned to each troop.

4. BCI detective lieutenants and captain troop commanders supervise the investigators. Detective lieutenants report directly to Major Nicholas Ruggerio, Director of the BCI unit.

5. BCI investigators and arson investigators have traditionally worked a "five on-two off" schedule. Except for an undetermined number of months in 1989 - 1990 and the schedule change effective June 1, 1995, which is at issue in this grievance, a "five on-two off" schedule has been a schedule in which an investigator works Monday through Friday for four or five weeks, depending upon the number of investigators assigned to the troop, and does not work on the weekend. On the fourth or fifth week, called the rotation week, an investigator works a duty weekend and has two days off during the week, either Monday and Tuesday or Thursday and Friday. Any time an investigator works a duty weekend, he or she also works any holiday that occurs that week and receives the contractually agreed upon holiday compensation of time and one half (Grievants' Exhibit 2).

6. When this traditional "five on - two off" schedule has been worked, supervisors occasionally have asked for volunteers to work standby and carry a pager on days off to cover unexpected staff shortages or to staff the mobile crime lab. Generally, standby is covered by investigators volunteering to be on standby in which they carry a pager. Each volunteer works approximately four times per year.

7. During the period of time in 1989 and 1990 that the investigators did not work the schedule set forth in Finding of Fact No. 5, they worked Monday through Friday and rotated being on standby status over the duty weekend. VSEA complained about the schedule change soon after it was implemented and ultimately the department reverted to its previous schedule. In addition, at an earlier period of time, in the 1970's, the BCI investigators worked a duty weekend standby schedule similar to the 1989 - 1990 schedule (Grievants' Exhibits 6, 7).

8. The BCI detective lieutenants who supervise the investigators work Monday through Friday and are not scheduled to work on the weekends. Sometime during 1995, the lieutenants complained to Ruggerio about the investigators' existing schedule. The lieutenants indicated a desire to revert to the schedule they had used in 1989- 1990. There were several reasons the lieutenants wished to revert to that schedule: there was a lack of contact with the investigators they supervised caused by at least one investigator in each troop being off two days during the week; the work load is heavier during the week; and employees did not agree over who should cover on Friday evenings. As funding did not allow the hiring of additional investigators to cover weekdays, Ruggerio agreed with the detective lieutenants. During December, 1994, Ruggerio approached VSEA Director of Field Services Steve Janson, and Grievant Holden, and expressed interest in reverting to the schedule the department had used in 1989 - 1990.

9. Over the next few months, VSEA and the detective lieutenants conducted various polls regarding the proposed schedule change. The polls' results were mixed and VSEA and the Employer were unable to reach any compromise position. On May 15, 1995, Lieutenant Colonel Lane Marshall notified Janson that the Employer planned to implement a new schedule for all BCI and arson investigators, effective June 1, 1995. The Employer implemented the new schedule on that date (Grievants' Exhibits 8, 9, 13, 14).

10. The new schedule required that all investigators work weekdays, Monday through Friday, except holidays. Weekends were covered by standby. Every fourth or fifth week, each investigator was scheduled for standby for his or her duty

weekend. Standby status on a duty weekend began at 5:00 p.m. Friday night and ended at midnight on Sunday night, a total of 55 hours. Investigators assigned to a duty weekend received the contractually agreed upon rate of 1/8 of his or her regular pay for each hour spent on standby status, excluding hours actually worked. If an investigator was called in, he or she received at least four hours of overtime pay. Under this new schedule, holidays that occurred during a week day also were covered by standby; whoever was on standby status on the duty weekend preceding the holiday also was on standby on the holiday.

11. The new schedule resulted in investigators no longer having two days off following their duty weekend. Also, investigators no longer worked holidays following their duty weekend and thus did not receive holiday compensation. Every fourth or fifth week, the new schedule resulted in investigators working five days, Monday through Friday, then being on standby for 55 hours over a duty weekend, then working the next five days, Monday through Friday.

12. On a duty weekend or holiday, BCI investigators were responsible for responding to any call-in in their troop geographic area. Two arson investigators covered the entire state on a duty weekend or holiday. One arson investigator was responsible for responding to any call-in in the northern half of the state on a duty weekend or holiday, and one was responsible for responding to any call-in in the southern half of the state on a duty weekend or holiday.

13. Ruggerio authorized the detective lieutenants under his supervision to set guidelines for the Employer's expectation for call-ins on standby duty weekends and holidays. Questions ultimately arose over investigators' specific

responsibilities to the Department on a duty weekend on standby status. On or about November 1, 1995, Detective Lieutenant William O'Leary issued an electronic mail memorandum to the investigators in his troop. Such memorandum stated in pertinent part:

AVAILABILITY:

It is expected that the detective will be available by pager or through a dispatcher who has a phone number where you can be reached during your pager duty. If there are extenuating circumstances where you cannot be reached by pager or phone, it is expected that the nearest barracks will be notified where/how you can be reached ALMOST IMMEDIATELY.

RESPONSE TIME: I see no reason why you cannot reasonably get to a scene within two hours on any given weekend. This can change as a result of bad road conditions etc., but two hours is not asking too much.

The barracks should be able to make initial contact with you almost immediately, thus the reason for having the pager. Therefore make arrangements for a backup plan if the pager isn't practical.

You must remain in the Troop E area . . . If for some reason you need to leave your area, a quick phone call to myself, the respective duty officer or Captain Sleeper should make it easier on you to do whatever you need to do.

. . . I have resisted putting these in writing because as you all know, headquarters may consider these less restrictive than what they have in mind (Grievants' Exhibit 17).

14. Investigators assigned standby on a duty weekend or holiday were not free to do anything they wished or to travel anywhere they wished. If the Department was unable to contact them, or if they did not respond to a call-in within a reasonable amount of time, generally considered to be two hours, they could be subjected to

disciplinary action or negative performance feedback.

15. Some Grievants refrained from going to dinner or attending a child's baseball game outside of their geographic troop area because it would take too long to respond to a call-in. Some Grievants refrained from doing such things as using a chain saw, running a lawn mower, cutting wood, and doing carpentry projects because they would not be able to hear the pager or a telephone. Some Grievants refrained from engaging in such work as gardening and painting because they would not have time to clean up, look presentable, pick up their cruiser and respond within two hours.

16. The Department does not have a method of differentiating between the number of times an investigator is called in while on standby during the week or during a standby duty weekend or holiday. During the calendar year 1994, there were 131 total call-ins. During the calendar year 1995, there were 197 total call-ins (State's Exhibit 1).

17. Grievants were not called in every weekend they were assigned to standby. Grievant Hatch was called approximately nine or ten times and was called in three times. Grievant Jennings was called approximately six times and called in four times. Grievant Holden received five and one-half hours of overtime compensation for call-ins. Grievant Danforth received two calls and handled both situations over the telephone.

18. Sometime subsequent to this grievance being filed and prior to the hearing before the Board, the Employer reverted to the pre-June 1, 1995 schedule for BCI and arson investigators.

OPINION

At issue is whether the Employer violated Articles 20 and 21 of the Contract by changing Grievants' work schedule from a schedule in which they worked week days and holidays and rotated working duty weekends every four of five weeks, with two days off following a duty weekend, to a schedule in which they worked week days and rotated being on standby status on holidays and duty weekends, without any week days off following a duty weekend.

Grievants contend that the Employer violated the Article 21 provision that "existing shift schedules as of June 30, 1988, are incorporated into this agreement" because the Employer made a unilateral change in a shift schedule that had been in effect since June 30, 1988 except for a period during 1989 - 1990. Grievants also contend that the Employer violated Article 20 because the new schedule resulted in their not receiving "104 scheduled days off per calendar year". Grievants contend that being on standby status is not a "day off" and they no longer received two days off during the week following a standby duty weekend.

The Employer contends that there was no violation of Article 20 because standby is not "work", Grievants could not be scheduled for standby on a day they were working and, therefore, any weekend they were scheduled for standby they were "off" work. The Employer also contends standby is not "work" for purposes of the federal Fair Labor Standards Act. The Employer further maintains that there had been other variations of the "five-on-two off" schedule, and it was free to adopt a schedule that would result in providing the best coverage and service, as it had in the past.

As a threshold matter, the Employer also contends that the issue of a schedule change is moot because it had reverted to the pre-June 1, 1995, schedule prior to the hearing in this matter and there is no actual controversy between the parties for the Board to rule on the issue. We first address this issue.

The Board has only that adjudicatory authority conferred on it by statute. Boyton v. Snelling, 147 Vt. 564, 565 (1987). In grievance proceedings, the Board's jurisdiction is limited by both the definition of the term "grievance" in 3 V.S.A. Section 902(14), and by the requirement that there be an "actual controversy" between the parties. In re Friel, 141 Vt. 505, 506 (1982). To satisfy the actual controversy requirement, there must be an injury in fact to a protected legal interest or the threat of an injury in fact. Id. Where future harm is at issue, the existence of an actual controversy turns on whether the individual is suffering the threat of actual injury to a protected legal interest, or is merely speculating about the impact of some generalized grievance. Grievance of Boocock, 150 Vt. 422, 424 (1988).

In this case, future harm is not at issue since the Employer reverted to the pre-June 1, 1995, schedule prior to the hearing. However, there is a potential injury to a protected legal right from the time the schedule changed on June 1, 1995, until the Employer reverted to the pre-June 1, 1995, schedule. If such an injury is found, Grievants would be entitled to a remedy for the period of time that the Employer violated the Contract by such schedule change. Thus, this grievance is not moot, and we continue with our analysis to determine whether a violation of the Contract occurred.

Article 21, Section 7, recognizes that the Employer has the general right to require employees to be placed on standby status. However, this provision of the Contract must be considered with other provisions of the Contract relevant to this case. A contract must be construed, if possible, so as to give effect to every part, and from the parts to form a harmonious whole. In re Grievance of VSEA on Behalf of "Phase Down" Employees, 139 Vt. 63, 65 (1980). The contract provisions must be viewed in their entirety and read together. In re Stacey, 138 Vt. 68, 72 (1980).

The standby provisions thus must be considered together with the provision of Article 20 that employees regularly assigned to work a "five on-two off" schedule "shall continue to be eligible to receive 104 scheduled days off per calendar year", and the provision of Article 21, Section 2, that "existing shift schedules in effect since June 30, 1988, are incorporated into this Agreement". In considering these contract provisions in their entirety, we conclude that the Employer violated the Contract through its unilateral implementation of the revised schedule effective June 1, 1995. The Employer made such an improper unilateral change in a shift schedule by changing employees' scheduled duty weekends from time actually worked to placement on standby status, eliminating days off which they had previously had after duty weekends, and eliminating the scheduling of holidays as time worked.

The Employer relies on the undetermined period during 1989 and 1990 in which a different schedule was in effect than the "five-on-two off" schedule effective for the remainder of the period between 1988 and May 31, 1995, to support its position that it was free to adopt a schedule that would result in providing the best

coverage and service, as it had in the past. In order for us to accept the Employer's position, we would have to conclude that there was a binding past practice not at variance with contract provisions to allow the Employer to act unilaterally with respect to schedule changes.

We have recognized that day-to-day practices mutually accepted by the parties may attain the status of contractual rights and duties, particularly where they are long standing and are not at variance with the contract provisions. Grievance of Beyor, 5 VLRB 222, 238-239 (1982). Such practices are implicitly imbedded in the contract and cannot be unilaterally changed by a party to the contract. Grievance of Cronan et al, 6 VLRB 347, 354 (1983). *Reversed on other grounds*, 151 Vt. 576 (1989).

The 1989- 1990 schedule cannot fairly be considered as mutually accepted by the parties. Although there were deviations from the manner in which investigators worked the "five-on-two off" schedule, the pre-June 1, 1995, schedule had been predominately in effect for approximately 20 years. Although the Employer had changed such practice for an undetermined number of months in 1989-1990, such change was not accepted by VSEA. VSEA objected to such changed schedule shortly after it was implemented, and the Employer ultimately reverted to the previous schedule, which then remained in effect until June 1, 1995. This history does not remotely approach a mutually accepted practice allowing the Employer to unilaterally change the existing schedule. Although the Employer has the general right to require employees to be on standby status, it cannot do so to the extent it results in unilaterally changing an established shift schedule.

Remedy

Having concluded that the Employer violated Grievants' contractual rights for a period of months, we turn to determining the appropriate remedy. Grievants request as a remedy that the Employer be required to compensate them with 55 hours of annual leave or compensatory time for each and every time that they were scheduled for a standby duty weekend, and that the Employer pay them the difference between overtime pay and standby pay for each holiday they were on standby status.

In determining an appropriate remedy to seek to make Grievants whole for the contractual violation, we recognize that every time Grievants were scheduled for a standby weekend, they lost some part of the value of time they could call their own. However, we also recognize that Grievants received standby pay each time they were scheduled for a standby duty weekend to compensate them for the infringement on their personal lives. Because Grievants received compensation for standby duty weekends, and in both the pre-June 1, 1995 and unilaterally imposed schedules Grievants basically worked a "five on-two off" schedule, we do not believe that it would be equitable for them to also receive annual leave or compensatory leave for that same period of time.

We do believe that Grievants are entitled to something in recognition for holiday pay they were denied due to the unilateral change of work schedule. We have determined that an equitable remedy would be one in which Grievants receive overtime compensation for any holidays that occurred during the period of time that they were required to be on standby status on holidays. This is the pay they normally

would have received had the schedule not been improperly changed. The most practical way to implement this remedy is to evenly divide the total number of holidays hours equally among the fifteen Grievants and compensate each Grievant at his or her overtime holiday rate, based on each Grievants' respective straight time pay rates as of the date this order is issued.

Some of the Grievants may have been on standby status on one or more of these holidays. However, in recognition of the harm committed by the Employer in making this unilateral change in violation of its contractual responsibilities, we conclude there shall be no deduction for any holidays that any of the Grievants may have worked.

ORDER

Now, therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED:

1. The Grievance of the Vermont State Employees' Association, Inc. , Warren Whitney, Michael Jennings, David Yustin, Gary Boutin, Bernard Chartier, David Tetrault, Myles Hefferman III, Charles Holden, Jean Lessard, Jeffrey Cable, Gloria Danforth, Martin Hatch, Ed Leddy, Robert Vargo, and Thomas Truex ("Grievants") is SUSTAINED; and

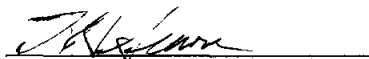
2. The Vermont Department of Public Safety ("Employer") shall compensate each Grievant consistent with this opinion for holidays that accrued during the period of time the Employer changed Grievants' work schedule effective June 1, 1995, to the time it reverted to the pre-June 1, 1995, schedule. The total number of holiday hours during this period shall be divided equally among the fifteen Grievants, and each Grievant shall be compensated at his or her overtime holiday rate for their share of the holiday hours, based on each Grievants' respective straight time pay rates as of the date of this Order. The Employer shall pay each Grievant within 30 days of this final order.

Dated this 14th day of June, 1996, at Montpelier, Vermont.

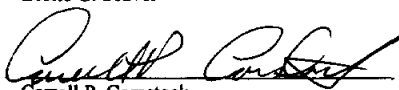
VERMONT LABOR RELATIONS BOARD



Catherine L. Frank, Chairperson



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